

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C22-5889-BAT

**ORDER REVERSING AND
REMANDING**

Plaintiff appeals ALJ David Johnson’s 2021 decision finding him not disabled. He contends ALJ Johnson erroneously excluded evidence from a 2018 final agency decision, misapplied the doctrine of *res judicata* and the *Chavez* presumption of nondisability, and misevaluated the medical evidence, the lay testimony and Plaintiff’s testimony. As relief, Plaintiff argues the Court should order a new hearing before a different ALJ, because ALJ Johnson ’s residual functional capacity (RFC) determination fails to account for his limitations and improperly adopted the findings and conclusions set forth in ALJ Paul Gaughen’s 2018 decision finding Plaintiff not disabled.

The Commissioner contends the Court should remand the case to address (1) the application of Acquiescence Rule 97-4(9) in light of the 2017 revised regulations regarding evaluation of medical evidence, and (2) permit Plaintiff to “take further action to complete the

1 administrative record resolving the above issue and issue a new decision.” Dkt. 21. The
2 Commissioner indicates Plaintiff does not oppose remanding the case but disagrees as to the
3 scope of remand and also contends ALJ Johnson should not rehear the case.

4 The Commissioner’s request for remand is narrow. The Commissioner asks the Court to
5 remand with direction the ALJ apply the 2017 regulations in evaluating the medical evidence
6 presented since ALJ Gaughen’s 2018 decision. In contrast, Plaintiff requests his case be
7 remanded to redetermine ALJ Gaughen’s 2018 decision and that decision’s findings regarding
8 the opinions of Dr. Powell, Dr. Coleman, Ms. Kelams-Keith and Ms. Wagner; the Court find
9 ALJ Gaughen’s 2018 decision violates the Appointments Clause, which would render ALJ
10 Gaughen’s final decision null and void; and the Court further find ALJ Johnson’s findings are
11 erroneous. The parties’ disagreement over the scope of remand requires the Court to address all
12 of Plaintiff’s claimed errors to determine the scope of remand.

13 BACKGROUND

14 In 2016, Plaintiff applied for Title II benefits. ALJ Gaughen conducted a hearing and on
15 May 30, 2018, issued a decision finding Plaintiff not disabled. Tr. 17. Plaintiff sought review of
16 ALJ Gaughen’s decision and this Court and the Court of Appeals affirmed ALJ Gaughen’s
17 decision. In January 2020, Plaintiff protectively filed a Title II application alleging disability
18 beginning on July 13, 2018. *Id.* After the 2020 application was denied initially and upon
19 reconsideration, ALJ Johnson held a hearing on August 25, 2021, at which Plaintiff moved, and
20 the ALJ granted, a request to amend the disability onset date to July 18, 2018. *Id.* At the 2021
21 hearing, Plaintiff also requested ALJ Johnson admit the testimony he gave at the hearing before
22 ALJ Gaughen in 2018. ALJ Johnson denied the request on the grounds this evidence was
23

1 presented in an untimely manner and because Plaintiff's 2018 testimony was fully and finally
2 adjudicated and concerned a time period "not at issue in the current application." *Id.* at 17-18.

3 On September 24, 2021, ALJ Johnson issued a decision finding:

4 (1) Plaintiff's prior unfavorable decision arose under the title of the Act that was
5 applicable to the unadjudicated period. Tr. 20.

6 (2) Plaintiff has failed to meet his burden of rebutting ALJ Gaughen's 2018
7 determination that Plaintiff is not disabled because Plaintiff has not shown a change in
8 circumstance to establish an increase in the severity of impairment. Tr. 20-21.

9 (3) ALJ Gaughen's 2018 decision determined Plaintiff's severe impairments are
10 affective disorder, generalize anxiety disorder and history of substance-addiction disorder; the
11 prior decision also considered other non-severe impairments including bowel defects, facet
12 hypertrophy, foot pain, bronchitis, obesity and PTSD. Tr. 21.

13 (4) The 2018 decision determined Plaintiff's impairments did not meet the
14 requirements of a listing or combination of a listing. Tr. 21.

15 (5) The 2018 decision determined Plaintiff has the residual functional capacity (RFC)
16 to perform a full range of work; understand, remember and apply detailed or complex
17 information and instructions; engage in routine and perfunctory social interaction but with limits
18 on interacting with the public; work best alone, with minimal collaboration with other workers
19 but can accept direction from supervisors. Tr. 21-22.

20 (6) No new findings are made because Plaintiff failed to overcome the presumption
21 of nondisability. ALJ Johnson found Plaintiff experienced no changed circumstances and the
22 record contains minimal evidence during the relevant period. In support, ALJ Johnson noted the
23 record shows Plaintiff had only one treatment visit during the relevant period when he was seen

1 in November 2018 for mental-health treatment. The ALJ found the observations and mental
2 status notes from the November 2018 visit do not show changes from the records before the
3 insured period. Plaintiff's November 2018 treatment record indicates he is on time, responds
4 politely, demonstrates good interpersonal skills, is neatly dressed and walked to the appointment
5 without difficulty, is alert and oriented, has good judgment and insight and exhibited no thought
6 disorder although his affect was tense. ALJ Johnson concluded Plaintiff's November 2018
7 treatment notes do not establish an increase in the severity of the Plaintiff's impairments or the
8 existence of an impairment not previously considered. Tr. 22.

9 (7) ALJ Johnson also considered the testimony Plaintiff offered regarding stress
10 related to his marriage and his "anxious ruminations" for which he was prescribed anti-psychotic
11 medications. ALJ Johnson noted after the November 2018 treatment visit, Plaintiff's next
12 treatment note is dated February 2019, which is after the relevant period. The ALJ noted the
13 treatment notes from the February 2019 visit do not mention "anxious ruminations" or triggers
14 related to difficulty interacting with others. ALJ Johnson concluded the medications prescribed
15 were helpful or Plaintiff's symptoms were transitory, and the record did not establish a change in
16 circumstance or increase in the severity of impairment. Tr. 22.

17 (8) ALJ Johnson further noted the state-agency psychologists, Vincent Gollogly,
18 Ph.D. and Eugene Kester, M.D., opined Plaintiff has the capacity to perform work. The ALJ
19 gave substantial weight to these opinions on the grounds they are consistent with the medical
20 evidence, effects of medications, Plaintiff's demonstrated functioning and the "continually
21 steady observations of Dr. Powell during the relevant insured period," and lack of mental health
22 treatment. Tr. 22.

1 (9) ALJ Johnson also considered and rejected the August 2021 opinion of John
2 Powell, Ph.D. who opined Plaintiff has poor ability to work with, or in close proximity to, others
3 and poor ability to get along with co-workers or peers. The ALJ found this opinion inconsistent
4 with the record noting Dr. Powell treated Plaintiff throughout the relevant period and found
5 Plaintiff polite, had good interpersonal skills, good judgment and did not display thought
6 disorder. ALJ Johnson also found Dr. Powell's opinion pertained to Plaintiff's functioning nearly
7 three years after the end of the relevant period. Tr. 23.

8 Based on the foregoing, ALJ Johnson found Plaintiff failed to overcome the *Chavez*
9 presumption of continued nondisability, has the capacity to perform past relevant work as an
10 environmental technician, as determined in the 2018 decision, and is therefore not disabled at
11 any time from the amended July 18, 2018, onset date through December 31, 2018, the last date
12 insured. Tr. 23.

13 DISCUSSION

14 A. Testimony Plaintiff Gave in 2018

15 Plaintiff contends ALJ Johnson erroneously failed to admit the testimony he gave at the
16 2018 hearing conducted by ALJ Gaughen. ALJ Johnson excluded the testimony on the grounds it
17 was not timely presented and because ALJ Gaughen's consideration of Plaintiff's 2018
18 testimony is a final determination. Plaintiff provides nothing showing his past 2018 testimony
19 establishes changed circumstances that overcomes the *Chavez* presumption of nondisability. The
20 Court accordingly declines to adopt Plaintiff's position that the Commissioner should be ordered
21 to admit his prior testimony, and that the testimony be deemed relevant. However, as the
22 Commissioner agrees the case should remanded, Plaintiff may make a timely request that the
23 ALJ on remand admit his past testimony.

1 **B. 2017 Changes in Evaluation of Medical Evidence**

2 Plaintiff contends ALJ Gaughen’s 2018 decision applied regulations applicable to a
3 disability application filed in 2016. ALJ Johnson’s 2021 decision involved an application filed in
4 2020, and ALJ Johnson did not address the change in regulations governing the evaluation of
5 medical evidence for applications filed after March 27, 2017. While Plaintiff presents nothing
6 showing this change results in harmful error, the Commissioner nonetheless concedes the case
7 should be remanded to address the impact of the 2017 regulatory change on the evaluation of the
8 medical evidence during the relevant period, July 13, 2018, to December 31, 2018. On remand,
9 the ALJ shall thus evaluate the medical evidence presented after ALJ Gaughen’s decision and
10 apply the 2017 regulations in assessing this new evidence.

11 **B. Res Judicata and *Chavez v. Bowen***

12 Plaintiff contends ALJ Johnson misapplied *Chavez v. Bowen*, 844 F.2d 691 (9th Cir.
13 1988) and the doctrine of res judicata. The Court in *Chavez* held a presumption of continuing
14 nondisability arises from the first ALJ’s findings of nondisability. *Id.* at 693. “[T]o overcome the
15 presumption . . . a plaintiff “must prove ‘changed circumstances’ indicating a greater disability.”
16 *Id.* These circumstances may include “[a]n increase in the severity of the claimant’s impairment”
17 or “the existence of an impairment not considered in the previous application.” *Lester v. Chater*,
18 81 F.3d 821, 827 (9th Cir. 1995). However, even if a claimant rebuts the presumption, the
19 previous ALJ’s findings regarding a claimant’s RFC, education, and work experience should not
20 be disturbed unless the claimant rebuts the presumption with evidence of changed circumstance
21 or new and material evidence. *Chavez*, 844 F.2d at 694.

22 ALJ Johnson specifically noted under *Chavez* there is a rebuttable presumption of
23 nondisability absent changed circumstances. Plaintiff argues that while ALJ Gaughen’s 2018

1 findings are entitled to “preclusive effect,” ALJ Johnson misapprehended the term “changed
2 circumstances.”

3 Plaintiff first contends that in 2018, ALJ Gaughen did not find PTSD is a severe
4 impairment and did not fully evaluate the impact of this impairment on Plaintiff’s RFC. This
5 contention stands apart from Plaintiff’s claim ALJ Johnson failed to account for the 2017
6 regulatory changes to the assessment of medical opinions submitted after ALJ Gaughen’s
7 decision. The contention also suggests that neither the doctrine of res judicata nor the *Chavez*
8 presumption are applicable. Dkt. 14 at 5. Plaintiff further suggests ALJ Johnson failed to
9 consider PTSD in the 2021 decision, a suggestion that also does not depend upon the 2017
10 regulatory changes.

11 Under *Chavez*, a claimant does not overcome the presumption of nondisability by
12 challenging the Commissioner’s first final decision finding the claimant not disabled. That is the
13 *Chavez* presumption is not overcome by claiming the first decision is erroneous. Here, Plaintiff
14 sought judicial review of the ALJ Gaughen’s 2018 decision in this Court in *David G. v.*
15 *Commissioner of Social Security*, 3:19-cv-05811-BAT; *see also* Tr. 129. In that case Plaintiff
16 contended ALJ Gaughen’s 2018 decision misevaluated the medical evidence, the lay testimony
17 and Plaintiff’s testimony. Plaintiff specifically argued the ALJ erred in discounting medical
18 opinions that included diagnoses of PTSD, and the impact of PTSD on his ability to perform
19 work. *See* Dkt 11 (opening brief in 2019 case).

20 ALJ Gaughen’s 2018 decision indicated Dr. Powell and Dr. Coleman both noted PTSD
21 as “the claimant reported he had a long history of anxiety and depression throughout a childhood
22 complicated by childhood traumatic experiences.” *See* Dkt. 8, 3:19-cv-05811-BAT (ALJ
23 Gaughen’s 2018 decision at Tr. 21). ALJ Gaughen indicated “[a]s a basis for his opinion, Dr.

1 Powell stated that the claimant with hypervigilant and paranoid due to PTSD.” *Id.* at 26. ALJ
2 Gaughen thus considered PTSD in rejecting Dr. Powell’s opinion.

3 The Court of Appeals for the Ninth Circuit affirmed this Court’s decision finding ALJ
4 Gaughen did not err in denying Plaintiff’s disability application and held substantial evidence
5 supports ALJ Gaughen’s decision to discount the opinions of Dr. Powell (which included PTSD
6 diagnoses) and Dr. Coleman; the ALJ properly discounted Plaintiff’s testimony and the
7 testimony of lay witnesses; and the ALJ did not err in determining RFC. *See* Dkt. 23 (2019 case).
8 Hence, Plaintiff’s claim ALJ Gaughen 2018 assessment of the impact of PTSD was erroneous,
9 incomplete, or that the ALJ overlooked the condition is belied by the record and does not
10 overcome the *Chavez* presumption of nondisability.

11 Additionally, because Dr. Powell diagnosed PTSD and the Court of Appeals affirmed
12 ALJ Gaughen’s 2018 determination to discount Dr. Powell’s opinions which were based in part
13 upon PTSD, there is no basis to conclude PTSD is a new condition that arose only after ALJ
14 Gaughen’s 2018 decision, or an overlooked condition that overcomes the *Chavez* presumption of
15 nondisability.

16 Plaintiff also contends ALJ Johnson’s 2021 decision failed to consider PTSD. This
17 contention suggests ALJ Johnson failed to determine whether there was a change in Plaintiff’s
18 PTSD symptoms since ALJ Gaughen’s 2018 decision. This claim also does not depend upon the
19 application of the 2017 regulations. The record shows ALJ Johnson discussed Dr. Powell’s
20 November 2018 source statement, which is the only medical record generated between July 18,
21 2018, and December 31, 2018—the relevant time period. Dr. Powell’s November 2018 source
22 statement contains diagnoses of generalized anxiety disorder, major depressive disorder and
23 **posttraumatic stress disorder**. Dr. Powell’s source statement does not indicate PTSD is a new

1 condition, or that the condition had become more severe. Rather, the ALJ found Dr. Powell's
2 November 2018 observations and mental status notes indicated no changed circumstances from
3 Plaintiff's earlier records. Dr. Powell reported in November 2018 Plaintiff was on time,
4 responded politely, demonstrated good interpersonal skills, was neatly dressed and walked to the
5 appointment without difficulty, was alert and oriented, had good judgment and insight and
6 exhibited no thought disorder although his affect was tense. Dr. Powell further indicated Plaintiff
7 stated things were going well with his wife, he went to three social events with her and had a
8 good time, that Plaintiff said he faced stress over a van he bought from his mother and her
9 requests he pay her for the purchase, and that the stress caused him to have angry outbursts. Dr.
10 Powell also noted Plaintiff's relationship with his father was developing and they have had really
11 good conversations.

12 The ALJ thus concluded Dr. Powell's 2018 medical statement does not establish an
13 increase in the severity of the claimant's impairments or the existence of an impairment not
14 previously considered. Tr. 22. Because the ALJ Johnson considered and discussed Dr. Powell's
15 November 2018 statement, the Court declines to adopt Plaintiff's argument that ALJ Johnson
16 failed to consider PTSD during the relevant period, and thus failed to determine whether there
17 were changes in the condition since ALJ Gaughen's 2018 decision. The Court makes this finding
18 because the 2017 regulation changes do not address whether ALJ Johnson completely failed to
19 address PTSD as Plaintiff claims. Rather, the record shows ALJ Johnson did consider PTSD as
20 noted above, and the Court thus rejects Plaintiff's argument to the contrary.

21 In addition to arguing ALJ Johnson omitted consideration of PTSD, the Court notes
22 Plaintiff contends ALJ Johnson erroneously found no "changed circumstances" by simply
23 adopting ALJ Gaughen's findings and without finding the new evidence, by a preponderance,

1 showed a change of circumstance. Under *Chavez*, ALJ Johnson was required to accept ALJ
2 Gaughen's 2018 findings, and thus ALJ Johnson correctly accepted the 2018 findings. ALJ
3 Johnson's acceptance of ALJ Gaughen's findings thus are in accord with *Chavez* and is not
4 affected by the 2017 regulatory changes.

5 However, as to Plaintiff's argument ALJ Johnson erroneously found no change of
6 circumstance, the parties' agreement the case must be remanded with direction the ALJ apply the
7 2017 regulations will necessarily require the ALJ to apply those regulations to the new medical
8 evidence regarding the relevant period which was generated following ALJ Gaughen's 2018
9 decision. Thus, the ALJ on remand must apply the 2017 regulations to the sole medical report
10 from the relevant period, the November 2018 treatment report, to determine whether Plaintiff has
11 shown changed circumstances that overcome the *Chavez* presumption. ALJ Johnson also
12 considered medical records generated after the relevant time period and these records should also
13 be assessed using the 2017 regulations.

14 The Court accordingly concludes ALJ Johnson did not violate the doctrine of *res judicata*
15 or the requirements of *Chavez*. The ALJ properly recognized that under *Chavez*, Plaintiff has the
16 burden to prove changed circumstances. Under *Chavez* ALJ Johnson was required to accept ALJ
17 Gaughen's earlier 2018 findings and did so. Additionally, the record shows ALJ Gaughen and
18 ALJ Johnson both considered the medical record which contained diagnoses of PTSD. There is
19 thus no basis to conclude the *Chavez* presumption of nondisability is inapplicable because PTSD
20 is a new condition that arose after the first ALJ's decision or a condition that was overlooked by
21 either ALJ. The Court makes these findings because they stand apart from ALJ Johnson's failure
22 to apply the 2017 regulation changes in assessing the new medical evidence presented after ALJ
23 Gaughen's decision.

1 As noted above ALJ Johnson considered the new evidence that was not before ALJ
2 Gaughen without acknowledging the 2017 regulatory changes. As such on remand the ALJ must
3 assess the medical evidence presented after ALJ Gaughen's decision, applying the 2017
4 regulations to determine whether Plaintiff has shown changed circumstances that overcome the
5 *Chavez* presumption of nondisability.

6 **C. Appointments Clause**

7 Plaintiff also contends ALJ Gaughen was not properly appointed when he issued the
8 2018 decision, and the 2018 decision is therefore invalid. The Court addresses this argument
9 because it is completely independent from ALJ Johnson's failure to acknowledge the 2017
10 regulation changes. The argument suggests the *Chavez v. Bowen* presumption is inapplicable
11 because there can be no presumption of nondisability when the presumption is based upon an
12 invalid decision. In support, Plaintiff cites *Lucia v. SEC*, 138 S.Ct. 2044 (2018) and *Cody v.*
13 *Kijakazi*, 48 F.4d 956, 962-63 (9th Cir. 2022). The *Lucia* decision was issued on June 21, 2018.
14 Plaintiff first sought judicial review of ALJ Gaughen's 2018 decision on August 30, 2019, but
15 did not raise a *Lucia* appointments clause argument in this Court or in the Court of Appeals for
16 the Ninth Circuit. See *David G. v. Commissioner of Social Security* 3:19-cv-05811-BAT, and
17 845 Fed.Appx 583 (9th Cir. 2021).

18 The Court finds this failure constitutes a waiver of the argument ALJ Gaughen was not
19 properly appointed, and his 2018 decision is null and void for all purposes and concludes
20 Plaintiff cannot now reraise it in this case, or somehow use it to revive the finding decision
21 denying his earlier disability application. In *Carr v. Saul*, 141 S.Ct. 1352 (2021), the Supreme
22 Court held claimants may obtain judicial review of an appointments clause challenge even if they
23 failed to raise the challenge at the agency level, i.e., before the ALJ or Appeals Council. The

1 *Carr* decision focuses solely on a failure to raise the appointments clause challenge at the agency
2 level and does not address or does not hold that claimants who fail to raise an appointments
3 clause challenge in federal court when they could have, can later reraise the challenge in a
4 subsequent challenge in federal court.

5 Importantly, the *Carr* decision did not alter the Court's earlier statement in *Lucia* that
6 "one who makes a timely challenge to the constitutional validity of the appointment of an officer
7 who adjudicates his case is entitled to relief," and "*Lucia* is entitled to relief because he pressed
8 his appointments clause claim at the agency level, in the Court of Appeals and in the Supreme
9 Court." *Lucia*, 138 S.Ct. at 2055. In contrast to *Carr* and *Lucia*, although Plaintiff sought federal
10 judicial review in this very Court and the Court of Appeals, Plaintiff never asserted ALJ
11 Gaughen's 2018 decision was invalid based upon an appointments clause claim. Consequently,
12 ALJ Gaughen's 2018 decision finding Plaintiff not disabled, and the decisions of this Court and
13 the Court of Appeals still stand and cannot be deemed invalid based upon the Appointments
14 Clause claim.

15 The *Cody* decision is also not grounds for relief because in that case, the Court of
16 Appeals addressed the narrow question of whether an ALJ appointed in violation of the
17 Appointments Clause can continue to make final decisions in the case after being ratified by a
18 constitutionally authorized official. The *Cody* Court held under *Lucia*, the claimant was entitled
19 to a different ALJ, but did not address whether the Appointments Clause claim was subject to
20 waiver. The *Cody* decision did not address waiver because *Cody* raised the constitutional defect
21 on the grounds the ALJ who decided his case was precluded from hearing his case under *Lucia*.
22 Thus, as in *Lucia*, the claimant in *Cody* pressed the Appointment Clause claim in federal court as
23 soon as he could.

1 In short, Plaintiff litigated in this Court and the Court of Appeals the validity of ALJ
2 Gaughen's 2018 decision and never raised an Appointments Clause challenge. The Court of
3 Appeals affirmed ALJ Gaughen's determination that Plaintiff is not disabled. If the Court
4 accepted Plaintiff's argument that ALJ Gaughen's 2018 decision is invalid because he was not
5 properly appointed, then the decisions of this Court and the Court of Appeals affirming ALJ
6 Gaughen's 2018 decision would also have to be vacated. The Court declines to do so and
7 concludes Plaintiff waived the Appointments Clause challenge and cannot reraise it now in this
8 case, or on remand.

9 **D. Evaluation of Medical Evidence Presented to ALJ Gaughen**

10 Plaintiff contends ALJ Johnson misevaluated the prior medical record that was before
11 ALJ Gaughen arguing ALJ Johnson did not include all relevant medical evidence from
12 Plaintiff's 2016 disability application for the period between 2015 and 2017. The Court
13 addresses this argument because it raises a question that is independent of ALJ Johnson's failure
14 to apply the 2017 regulations to the new medical evidence, presented after ALJ Gaughen's
15 decision.

16 Plaintiff argues ALJ Johnson's evaluation of the medical record that was before ALJ
17 Gaughen is erroneous. Plaintiff contends Dr. Powell indicated in various records and source
18 statement created between 2016 through April 2018, and that were before ALJ Gaughen that
19 Plaintiff had marked and moderate limitations in his ability to perform work. Plaintiff argues
20 ALJ Johnson erred by failing to include in the RFC determination "all of the functional
21 limitations described by Dr. Powell." Dkt. 12 at 11. The argument suggests ALJ Johnson erred
22 by failing to reevaluate ALJ Gaughen's findings, i.e., overturn ALJ Gaughen's findings.
23 However, Plaintiff already challenged ALJ Gaughen's 2018 determination to discount Dr.

1 Powell's opinions and the Court of Appeals for the Ninth Circuit rejected that challenge and
2 affirmed ALJ Gaughen's 2018 decision. ALJ Johnson was required to accept ALJ's Gaughen's
3 findings, and thus did not err in accepting ALJ Gaughen's determination to discount Dr. Powell's
4 opinions. The 2017 regulation changes provide no support to Plaintiff's argument to revisit ALJ
5 Gaughen's earlier final decision, and thus the Court finds no basis for the ALJ on remand to
6 deviate or disregard from ALJ Gaughen's 2018 findings regarding the medical evidence.

7 Plaintiff similarly argues ALJ Johnson should have found the opinions of Dr. Coleman
8 and ARNP Kellems-Keith that ALJ Gaughen had assessed are also grounds for relief. The Court
9 rejects the argument for the same reason it rejected Plaintiff's argument about Dr. Powell.

10 Plaintiff finally argues ALJ Johnson failed to evaluate the records of Laura Wagner,
11 ARNP which were generated between May 2019 and March 2020. Tr. 407-26. These records
12 were generated after the relevant time period which ended in December 2018. Because these
13 records should have been reviewed under the standards set forth by the 2017 regulations, the ALJ
14 on remand should reassess Ms. Wagner's records.

15 **E. Plaintiff's Testimony**

16 As noted above, Plaintiff argues ALJ Johnson erred by declining to admit the testimony
17 he gave when he appeared before ALJ Gaughen: Plaintiff last worked in 2014 when he
18 difficulties with his boss, would scream and yell, was overwhelmed by work, and had a major
19 breakdown; was expelled from a graduate program; needed help with childcare; had a hard time
20 interacting with people at a friend's wedding; took medication for his issues; and is angry and
21 lashes out due to PTSD.

22 The Court rejects Plaintiff's claim ALJ Johnson harmfully erred in declining to admit the
23 testimony Plaintiff gave before ALJ Gaughen. ALJ Gaughen considered and discounted

1 Plaintiff's testimony. ALJ's Gaughen's treatment of Plaintiff's testimony was affirmed, and thus
2 the Court does not revisit it. Additionally, Plaintiff presents nothing that shows his prior
3 testimony shows changed circumstances since ALJ Gaughen issued his final decision. The Court
4 makes this finding because ALJ Johnson's determination not to admit Plaintiff's prior testimony
5 is not affected by the 2017 regulations.

6 Plaintiff also argues ALJ Johnson erred in discounting the testimony Plaintiff gave at the
7 hearing before ALJ Johnson. Plaintiff submits he testified that when he last worked, he had some
8 struggles in completely tasks; he was combative when supervisors reprimanded him; he got
9 progressively worse and worse and would lash out at people; he was argumentative with
10 coworkers; coworkers were fearful of Plaintiff. Plaintiff stated to ALJ Johnson that between July
11 and December 2018, he took his kids to school but that was about the only time he would leave
12 his house; he ran errands at times when he thought there would be the fewest number of people
13 about; twice a month he would not take his kids to school due to high anxiety; his anxiety "used
14 to happen when he was working" to the point he would shut down; he has PTSD that makes him
15 anxious, and unfocused; and that he watches TV but loses focus.

16 Plaintiff argues the ALJ failed to give clear and convincing reasons to discount his
17 testimony. The Court rejects this argument. The argument is made in a conclusory fashion.
18 Plaintiff argues ALJ Johnson erred but provides no explanation that fleshes out the reasons why.
19 The argument specifically fails to set forth any reason to conclude Plaintiff's most recent
20 testimony shows changed circumstances to overcome the *Chavez* presumption of nondisability.
21 Rather, Plaintiff's most recent testimony reveals his symptoms have not worsened since the time
22 ALJ Gaughen issued the final decision. The Court accordingly declines to adopt Plaintiff's
23

1 claim that ALJ Johnson misevaluated Plaintiff's testimony. The reaches this decision because
2 Plaintiff's claimed error is not based upon or reliant on the 2017 regulations.

3 **F. Lay Testimony**

4 Plaintiff contends ALJ Gaughen received testimony from Plaintiff's wife and Plaintiff's
5 former supervisor. In the 2018 decision, ALJ Gaughen considered and discounted this lay
6 evidence. Plaintiff contends "the ALJ fails to evaluate lay evidence" and if the ALJ had fully
7 credited this evidence a different disability determination could have been reached. This Court
8 and the Court of Appeals has already affirmed ALJ Gaughen's 2018 decision and the Court
9 therefore declines to revisit the ALJ's determination to discount the lay testimony, as suggested
10 by Plaintiff or to find ALJ Johnson erred by not overturning ALJ Gaughen's determinations.

11 Plaintiff's wife also submitted a third-party function report which is dated April 20, 2020,
12 for ALJ Johnson's consideration. Tr. 297. ALJ Johnson failed to mention this report but even
13 assuming the ALJ erred, the error is harmless. The 2020 function report is far past the relevant
14 time period and thus not a basis to show changed circumstances during the relevant period
15 ending in December 2018. Further, the 2020 function report mirrors the testimony Plaintiff's
16 wife gave earlier when ALJ Gaughen issued the first decision. The 2020 report thus fails to
17 establish changed circumstances. The Court makes this finding because Plaintiff's argument the
18 ALJ erred in assessing the lay evidence is not reliant upon the 2017 regulation changes.

19 **G. New ALJ on Remand**

20 The Court rejects Plaintiff's request that the Court order a different ALJ rehear this case
21 on remand. ALJs "are presumed to be unbiased." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
22 Cir. 2001). Plaintiff has failed to rebut this presumption by a showing of conflict of interest or
23 some other specific reason for disqualification. *Id.* at 857-58. While the Commissioner concedes

1 ALJ Johnson did not account for the impact of the 2017 revised regulations on the evaluation of
2 medical evidence, this error does not evidence disqualifying conduct and there is no basis to
3 assume ALJ Johnson will be unwilling to apply the 2017 regulations on remand. Nothing in this
4 order precludes the Appeals Council from remanding to a different ALJ, if it so chooses.

5 **CONCLUSION**

6 Plaintiff argues ALJ Johnson harmfully erred in numerous ways and that ALJ Gaughen's
7 final 2018 decision finding Plaintiff not disabled is void because it was issued in violation of the
8 Appointments Clause. The parties agree the case should be remanded because ALJ Johnson did
9 not acknowledge or clearly apply the 2017 regulations in assessing the new medical evidence he
10 received but disagree on other aspects of the scope of remand.

11 Because Plaintiff has raised many arguments that stand apart from application of the
12 2017 regulations to the new medical evidence generated after ALJ Gaughen's decision, the Court
13 for the sake of clarity makes the following findings that will govern the scope of remand:

- 14 1. The Court declines to order the Commissioner to assign a new ALJ on remand.
- 15 2. The Court finds Plaintiff waived the Appointments Clause argument. ALJ
16 Gaughen's final 2018 decision was affirmed by this Court and the Court of Appeals. The ALJ on
17 remand must thus abide by the *Chavez* presumption of nondisability and accept ALJ Gaughen's
18 2018 findings. Plaintiff may not reraise the Appointments Clause argument on remand.
- 19 3. The Court rejects Plaintiff's argument ALJ Johnson erred by failing to credit the
20 opinions that Dr. Powell, Dr. Coleman, Ms. Kellams-Keith and Ms. Wagner to ALJ Gaughen,
21 and which were considered by ALJ Gaughen. There is no basis to conclude ALJ Johnson or the
22 ALJ on remand may reevaluate and reject ALJ Gaughen's 2018 determinations as to opinions
23 that these individuals provided when the 2018 decision was issued.

